MOK WEI TAK & ANOR.

v.

THE QUEEN

COURT OF APPEAL, HONG KONG
LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
[PRIVY COUNCIL APPEAL NO. 38 OF 1987]
6 FEBRUARY 1990

STATUTORY INTERPRETATION: *Prevention of Bribery Ordinance 1971 [HK] - Section 10(1)(a) - Crown servants - Section 2(1) definitions - Penalties under s. 12 - Burden of proof under s. 10(1)(a) - Comparison to s. 3 - Construction of long title to the section.*

The appellants were husband and wife who were convicted by a jury on two counts; the husband under s. 10(1)(a) of the Prevention of Bribery Ordinance (the Ordinance) and the wife with aiding and abetting her husband in relation to that offence. The appellants appealed on all grounds; both appeals against conviction were dismissed. The sentences of imprisonment were reduced and the monetary penalties which were imposed were set aside. The appellants were then granted special leave to appeal to the Privy Council.

On the wife's behalf, the main question for determination was whether it was possible for her to be guilty of aiding and abetting the offence in s. 10(1)(a) of the Ordinance, notwithstanding the fact that her husband was guilty under the said section. Construction and effect of s. 10(1)(a) discussed.

Held:

[1] The law relating to aiding and abetting is the same in Hong Kong as in England. See *Johnson v. Youlder* [1950] 1 KB 544 Lord Goddard CJ at pp. 546-7.

[2] As a general proposition, any criminal offence may be the subject of aiding and abetting if the alleged aider and abettor knows the facts which constituted the principal offence and actively assisted and encouraged the principal offender.

[3] The counts were correctly framed, given that it was decided to proceed only under s. 10(1)(a).

(a) The Court of Appeal and the learned Judge were right in rejecting the argument that no offence was committed until the defendant had failed to discharge the *onus* of proof which rested upon her.

(b) Both the natural construction of s. 10(1)(a) and the weight of authority both in Hong Kong and Australia make it plain that the offence is the maintaining of a standard of living which cannot be satisfactorily explained. The burden of giving that explanation resting upon the defendant.

(c) The offence consists, not of a single act or of a succession of acts, but of a course of conduct during a period of time in relation to which the charge is brought under s. 10(1)(a). If a defendant is unable to give a satisfactory explanation he is likely to know that this is the case. The decisions in Hong Kong which have held otherwise must be treated as having been wrongly decided.

(d) There is no doubt that s. 10(1) creates an offence different from the other offences enacted by Pt II of the Ordinance.

Per Lords Bridge and Jauncey (dissenting):
On the true construction of s. 10, the wife could not be convicted of aiding and abetting the husband's offence.

[Appeals dismissed with costs.]

Cases referred to:
Lai Man-Yau v. Attorney-General (No. 2) [1978] HKLR 546
Johnson v. Youlder [1950] 1 KB 544
Bainbridge [1960] 1 QB 129
Maxwell [1978] 1 WLR 1363
McCarthy [1964] L8 CAR 111
Li Man v. The Crown [1952] HKLR 77
Chan Hoi & Anor. v. The Queen [1966] HKLR 42
The Queen v. Li Ping-Lun & Anor. [1977] DCLR 32
Cheng Lai-Kuen v. The Attorney-General [1975] HKLR 499
Cheung Sou-yat v. The Queen [1979] HKLR 630
Lee Fan v. Dempsey [1907] 5 CLR 310
Attorney-General v. Lo Man-cheuk [1980] HKLR 687
Reg. v. Cheung Chee-Kwong [1979] HKLR 362
Zanetti v. Hill [1962] 433 CLR

Legislation referred to:
Drug Trafficking Offences Act 1986 [HK], s. 24
Police Act 1892 (West Australia) [Aust], s. 65, 65(1)
Prevention of Bribery Ordinance (Cap 201) [HK], ss. 2(1), 3, 4, 5, 10, (1), (1)(a), 12, (1)(a), (1)(b), 31
Summary Offences Ordinance (Cap 228) [HK], s. 29 (now s. 30)

Other source referred to:
Hong Kong Law Journal [1976], by Mr. Bernard Downey

JUDGMENT

Lord Roskill:

The first and second appellants were and are respectively husband and wife. Their Lordships will so refer to them. On 10 May 1985 each was convicted upon an indictment containing two counts, the first charging the husband with an offence against s. 10(1)(a) of the Prevention of Bribery Ordinance (Cap. 201), the second charging the wife with aiding and abetting her husband in that offence. After no less than three abortive attempts the trial, which resulted in these convictions, began on 21 January 1985 and lasted some 67 working days. Notwithstanding the length of the trial the jury, after a long summing-up by Addison J which, whether correct or not in relation to matters of law regarding the second count, their Lordships regard as a model of fairness, factual accuracy and clarity, the jury convicted the husband and the wife after a retirement of almost exactly two and a half hours. Heavy sentences were passed upon both the appellants. Each appealed. The appeals were heard by the Court of Appeal (Li V.P., Silke J.A. and Power J) over a period of 8 days in March 1986. On 6 June 1986 both appeals were dismissed. The leading judgment was given by Silke J.A. Their Lordships were told that the Court of Appeal, though dismissing the appeals against conviction, substantially reduced the sentences of imprisonment and set aside the monetary penalties imposed. The wife's immediate custodial sentence imposed by the

learned Judge was varied to a suspended sentence. The husband's reduced immediate custodial sentence has been served. Subsequently, on 21 May 1987 their Lordships granted the husband and the wife special leave to appeal.

The facts leading to the convictions are fully detailed in the judgment of Silke JA in the Court of Appeal, and their Lordships do not propose to repeat them. Suffice it to say that if, as is plainly the case, the jury disbelieved the husband, there was ample evidence to justify his conviction. Similarly, there was ample evidence to justify the conviction of the wife, who did not give evidence, if the learned Judge's direction to the jury on the relevant matters of law in her case was correct.

Though a number of arguments were advanced before their Lordships on behalf of both the husband and the wife, Mr. Du Cann Q.C., who did appear for the appellants in either Court below, first advanced his submissions on behalf of the wife. He contended, as had been contended on her behalf in the Court of Appeal and indeed before the learned Judge, that even if the husband had been guilty as a principal offender of an offence against s. 10(1)(a) of the Ordinance, it was not possible as a matter of law for the wife or indeed any other person to be guilty of aiding and abetting that offence, having regard to the nature of the offence with which the principal offender was charged and indeed ultimately convicted. As the numerous previous decisions to which their Lordships were referred and to which reference will be made hereafter show, there has been in the past a marked difference of opinion on this question, a difference which it now falls to their Lordships to seek to resolve.

So to do involves a close examination not only of s. 10(1) itself, but also certain other sections of the Ordinance which are said to illuminate the true construction of s. 10(1). The long title of the Ordinance states as its purpose "to make further and better provision for the prevention of bribery and for purposes necessary thereto or connected therewith". It is notorious, as indeed the decided cases make all too clear, that for many years corruption has been endemic in Hong Kong. The provisions of the Ordinance, which has been successively amended since it was first introduced in 1970, are clearly designed to enable corruption, especially in the case of Crown and public servants, to be more readily established and, when proved, drastically punished. Section 10(1) itself has been described as draconian. Since unusually in the criminal law the subsection casts a burden of proving the absence of corruption upon a defendant, the epithet is not inappropriate. But it is the language in which this draconian provision has been enacted by the legislature which has given rise to differences of opinion as to the meaning of the subsection and as to doubts as to the true character of the offence thereby created.

Section 10(1) creates an offence, whatever the precise nature of that offence, in the case of Crown servants. "Crown servant" is defined in s. 2(1) as "a person holding an office of emolument, whether permanent of temporary, under the Crown in right of the Government". There is no doubt that the husband was at the material time a Crown servant. There is equally no doubt that at the material time the wife was not and clearly could never have been charged as the husband was charged as a principal offender. The husband was also a public servant within the definition of that phrase in that subsection, but again the wife was not. Section 10 does not apply to public servants. It does however apply to past and present Crown servants. Section 3 provides that "any Crown servant who, without the general or special permission of the Governor, solicits or accepts any advantage shall be guilty of an offence". Section 3 thus applies only to present Crown servants. "Advantage" is defined in s. 2(1) in terms so wide that it would seem, in the absence of such general or special permission, to make the receipt by a Crown servant of a Christmas present from his family

an offence against s. 3. No doubt it was for this reason that the Governor has issued a notice, which their Lordships were shown, stating what might be regarded as legitimate gifts to be given to, and received by, a Crown servant. Sections 4 and 5, to which their Lordships need not refer in detail, deal with offences by public servants and those offering advantages to public servants.

Their Lordships now turn to s. 10(1) which for ease of reference they set out in full.

> 10(1). Any person who, being or having been a Crown servant:
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> (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or
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> (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,
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> shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

Section 12 establishes a range of penalties for the different offences under the Ordinance. Section 12(1)(a), which in terms has no application to a s. 3 offence, provides for penalty after conviction of a Crown servant on indictment for, *inter alia*, an offence against s. 10, of a maximum fine of HK$500,000 and imprisonment for a period of up to ten years. Section 12(1)(b) provides for a penalty after summary conviction of a Crown servant for, *inter alia*, an offence against s. 10 of a maximum fine of H$100,000 and imprisonment for a period of up to three years. In marked contrast, an offence by a Crown servant against s. 3 carries only a maximum fine of H$100,000 and imprisonment for one year. There are also various forfeiture provisions in the several cases. This differentiation in penalties suggests that the legislature regarded an offence against s. 10 under which, once the Crown discharged the limited *onus* of proof which rests upon it, the negative burden then passes entirely to a defendant, as infinitely more grave than an offence against s. 3 where the offence by a Crown servant of soliciting or accepting receipt of a bribe, under which section the entirety of the burden rests upon the Crown. Their Lordships find the apparent differentiation strange, since it seems likely that s. 10 was introduced because of the notorious evidential difficulty of proving offences against s. 3. However, as was pointed out by the Board in *Lai Man-Yau v. Attorney-General* (No. 2), [1978] HKLR 546 at 549, "It is not for the Courts to decide whether an Ordinance ought to have been passed but only what it means once it is passed and then to enforce it". In that case, the Board had no difficulty in concluding that s. 10(1)(b) of the Ordinance was "clear and unambiguous".

Their Lordships were referred to other provisions of the Ordinance, especially those according special powers of investigation and requiring the giving of explanations on oath by suspected persons, and those which relax the ordinary rules of evidence. Those require no special mention. Their Lordships do, however, draw attention to s. 31 which requires the prior consent of the Attorney-General to the prosecution for any offence under Part II of the Ordinance which includes both s. 3 and s. 10.

It was not in issue that the law relating to aiding and abetting is the same in Hong Kong as in England. It has been stated and restated so often in authoritative terms that their Lordships see no reason to re-examine in detail the long line of relevant authorities to many of which they were referred. In *Johnson v. Youlder* [1950] 1 KB 544, Lord Goddard CJ, at pp. 546-7, said:

> Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, 'I knew of all those facts but I did not know that an offence was committed' would be allowing him to set up ignorance of the law as a defence. The reason why, in our opinion, the justices were right in dismissing the informations against the first two defendants is that they found, and found on good grounds, that they did not know of the matters which in fact constituted the offence; and, as they did not know of those matters, it follows that they cannot be guilty of aiding and abetting the commission of the offence.

This passage and passages in other cases such as *Bainbridge* [1960] 1 QB 129, were cited and followed by the Court of Appeal, Northern Ireland, in a judgment by Sir Robert Lowry CJ, (as he then was), in *Maxwell* [1978] 1 WLR 1363, later affirmed in the House of Lords at p. 1351. There is no doubt therefore what the Crown has to prove against a defendant in order to bring home a charge of aiding and abetting a particular offence. There is also no doubt that as a general proposition, any criminal offence may be the subject of aiding and abetting if the alleged aider and abettor knows the facts which constituted the principal offence and actively assisted and encouraged the principal offender. See *McCarthy* [1964] L8 CAR 111, where the Court of Criminal Appeal (Lord Parker CJ, Winn and Fenton Atkinson JJ) at pp. 114 & 115, said:

> In the view of this Court, a man may properly be convicted of aiding and abetting this offence if it is found; (a) that he knew that the principal offender had explosives in his possession or under his control; (b) that he knew facts giving rise to a reasonable suspicion that the principal offender did not have such explosives in his possession or under his control for a lawful object: (c) that he was present actively encouraging or in some way helping the principal offender in the commission of this offence.

McCarthy was a case of alleged aiding and abetting the possession of explosives. Their Lordships draw particular attention to this passage, which would appear to have been the foundation of the direction given to the jury by Addison J in the present case in relation to the wife.

The submission advanced by Mr. Du Cann Q.C. for the wife may be summarised as follows. There are two essential ingredients in the offence created by s. 10(1)(a). The first is the maintenance of a standard of living which is not commensurate with past or present official emoluments. The second is the failure by the principal offender to give a satisfactory explanation to the Court how he was able to maintain that standard of living. Until there has been that failure to give that satisfactory explanation, no offence has been committed. It was therefore impossible for the alleged aider and abettor to have knowledge of that second element, namely, that the principal offender would be unable to give that satisfactory explanation.

This submission central to the wife's appeal makes it necessary for their Lordships to examine, with the aid of the relevant authorities, what the offence is which is created by s. 10(1)(a). It is to be observed that the first count of the indictment did not charge the husband with more than maintaining a standard of living above that commensurate with his present official emoluments. There is no reference to what is said to be the second element in the offence.

Likewise the second count, that against the wife, charged her only with aiding and abetting that with which the husband was charged. In their Lordships' view, these counts were correctly framed, given that it was decided to proceed only under s. 10(1)(a). In this connection, their Lordships express some surprise that the charge was not laid under s. 10(1)(b), or possibly under both paragraphs of the subsection. Had a charge been laid under the second of the subparagraphs, many of the present difficulties might well not have arisen, especially in view of the decision of the Board in *Lai Man-Yau v. The Attorney General* (No. 2) to which their Lordships have already referred.

A number of possible constructions of s. 10(1)(a) were canvassed in argument. The first has already been mentioned. It was that there are two essential elements to the offence and that no offence is committed until the defendant has failed to give a satisfactory explanation. The second, at the opposite extreme, is that the mere maintenance of a standard of living which is not commensurate with past or present official emoluments is itself an offence. In between the two extremes the third, and possibly a fourth construction, were canvassed. The third, upon which Mr. Denny Q.C. for the Crown principally relied, was that the offence was committed when the defendant knew that he could not provide a satisfactory explanation. On this view, failure to supply a satisfactory explanation to the Court was not a essential ingredient of the offence. The fourth, a variant of the third, was that the offence lay in the maintenance of an excessive standard of living a together with a factual incapacity for providing a satisfactory explanation.

Another view was also canvassed. This was that s. 10 did not create a new offence such as was claimed on behalf of the Crown, but was directed to enabling convictions to be secured where the facts raised a presumption of corruption so that a defendant must then satisfactorily rebut that inference or face conviction. It was suggested that s. 10 was directed to the acceptance of a bribe which enabled an excessive standard of living to be maintained, and thus to the origin of the resources, rather than to the manner in which those resources corruptly acquired might be deployed. Attention was drawn to the fact that s. 3 applied only to current Crown servants whereas s. 10 applied to both past and present Crown servants.

Mr. Du Cann's submission found support in an article written in (1976) *Hong Kong Law Journal* by Mr. Bernard Downey (as he then was), for the reasoning in which Mr. Downey sought to find support in two decisions given, not under the Prevention of Bribery Ordinance, but under s. 29 (now s. 30) of the Summary Offences Ordinance (Cap. 228). The first was *Li Man v. The Crown* [1952] HKLR 77. The relevant section provided:

> Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the Magistrate how he came by the same, shall be liable to a fine ... or to imprisonment for three months.

William J, in giving judgment in that case at p. 83 said:

> Here no offence has been committed, because it is no offence for a person to be on the street in unlawful possession, no offence whatever. It is only an offence when that person is hailed before the Magistrate and is unable to give a reasonably satisfactory explanation of how he came into possession ...

The second decision was *Chan Hoi & Anor. v. The Queen* [1966] HKLR 42 where Briggs J, at p. 45, said:

> The learned Magistrate held that the offence under the section is complete without failure to give an account and that the giving of such a satisfactory account is merely a matter of defence. It is clear from the case of *Li Man* that this is not so. The offence is not complete

> until the person is hauled before a Magistrate and is unable to give a reasonably satisfactory explanation of how he came into possession.

Thus the learned Judge followed in the second case the decision in the first case.

After the publication of Mr. Downey's article, the question arose under s. 10(1)(b) in *The Queen v. Li Ping-Lun & Anor.* [1977] DCLR 32. Rhind DJ, after referring to the article, said at p. 45:

> Once it is accepted that failure to give a satisfactory explanation to the Court is an essential ingredient without which the commission of the offence is not complete, I find it difficult to see how the offence can lend itself to be aided and abetted. There is certainly something odd about an offence which is supposed to have been committed on 13 September 1973 but which lacks an essential ingredient until the case is actually in Court some four years later.

The learned District Judge, however, went on to refer to *Cheng Lai-Kuen v. The Attorney-General* [1975] HKLR 499 in which Huggins J, as he then was, had held that an offence against s. 10(1)(b) could be the subject of an aiding and abetting charge. The learned District Judge plainly thought that this decision was wrong, but nonetheless after referring to the two cases to which their Lordships have already referred, felt bound to follow it.

There is thus a substantial body of judicial opinion in Hong Kong favourable to Mr. Du Cann's main submission. He also referred to an observation of Huggins J.A. in *Cheung Sou-yat v. The Queen* [1979] HKLR 630 where the learned Judge of appeal, in a quite different context, said at pp. 635 and 636:

> ...but s. 10 creates a unique type of offence, the essence of which is a failure by the defendant to explain at the trial rather than the doing of an act before the proceedings are instituted. It therefore seems not only reasonable, but also vital in the interests of justice to the suspect, that, before he is charged with an offence, it should be ascertained whether he will be able to offer an explanation.

The context in which that observation was made is, however, very different from the context in which the matter arises in the present appeals. Their Lordships are clearly of the view that this passage in no way supports Mr. Du Cann's argument.

It is to be observed that in the same year in *Ho Shing-Tuen v. The Queen*, (unreported, 1979 No. 5/79 Criminal) Huggins J.A., sitting in the Court of Appeal, said in a case arising under s. 10:

> While it is true that there can be no conviction until the appellant has failed to explain his assets, it seems to us that failure was not an omission in part constituting the offence ... The act constituting his offence was the possession on the charge date of assets which he would not when called upon e able to give a satisfactory explanation. A satisfactory explanation would have given that *prima facie* criminal act an innocent character.

In their Lordships' view, it is inconceivable that, if the learned Judge of appeal in his judgment in the last mentioned case had meant to express a different view from that which he had expressed a short while before when sitting in the same Court - less than three months elapsed between the two judgments - his change of view would not have fully been explained by him.

Mr. Denny Q.C. also sought support from two decisions of the High Court of Australia, *Lee Fan v. Dempsey* [1907] 5 CLR 310, and *Zanetti v. Hill* [1962] 433 CLR. Both these cases arose under s. 65 of the Police Act 1892 of West Australia. That section provided that:

> Every person who shall commit any of the next following offences shall be deemed an idle and disorderly person within the meaning of this Act ... (1) Every person having no visible lawful means of support or insufficient lawful means of support who being thereto required by any Justice or who, having been summoned for such purpose or brought before any Justice shall not give a good account of his means of support to the satisfaction of such Justices.

In the second case, the decision in the first case was applied and followed. Kitto J, at p. 441 of the report, said:

> Section 65(1) is not without its difficulties of construction, but in the main they disappear, I think, when considered in the light of the judgments delivered in this Court in *Lee Fan v. Dempsey*. ... Clearly the provision is not directed to the punishment of poverty. It does not imply that there is some standard of living to be regarded as a norm, and provide for the punishment of a person as idle and disorderly because he is unable to maintain that standard. Provisions in the terms of s. 65(1) seem always to have been understood, so far as I can gather from the cases, as taking a person's actual standard of existence and addressing themselves to the means that he has for his support at that standard. If he either has no lawful means of support visible ... or has some but not sufficient lawful means of support, the section dubs him an idle and disorderly person and provides for his being imprisoned, provided that a condition is first fulfilled. The condition is that after opportunity given he does not give the justice before whom he comes a good, that is credible, account of his means of support to the satisfaction of the justice. The reason for so treating him is obvious: a person whose means of support so far as they are lawful are insufficient for the way he is living may fairly be regarded as belonging to a class of persons likely to resort for their support to activities from which society needs to protect itself ... It is hardly necessary to emphasise, fifty years or more after the decision in *Lee Fan v. Dempsey* that the words of s. 65(1) referring to a failure to give a good account do not describe an ingredient in the offence; they describe only a condition which must be fulfilled before a defendant can be convicted.

Subsequently, in *Attorney General v. Lo Man-cheuk* [1980] HKLR, 687, Macdougall J, in a case under s. 30 of the Summary Offences Ordinance, followed the two Australian cases and the passage which their Lordships have already quoted from the judgment of Huggins JA in *Ho Shing-tuen v. The Queen* (*supra*).

When, in his summing up, Addision J came to deal with the charge against the wife, he gave the jury the following direction, which their Lordships think right to set out in full:

> The Crown must prove - now I am reading this copy of the document which you have, members of the Jury - beyond reasonable doubt
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> (1) that she knew the first defendant maintained during the charge period a standard of living above the commensurate with his official emoluments as a civil servant;
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> (2) that she also knew that the first defendant would be unable to prove to the Court that it was more likely than not that the money he used to maintain his said disproportionate standard of living in the charge period came from an untainted source, i.e. a source untainted by corruption; and
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> (3) that she, knowing all this, aided and abetted him to continue to maintain that standard of living in the charge period by actively assisting him in concealing or otherwise dealing with his money so as to make it possible for him to continue with that standard of living.

As already stated, their Lordships think this direction was plainly founded upon the decision of the Court of Criminal Appeal in *McCarthy* (*supra*). The Court of Appeal upheld that direction, stating, as was the fact, that the decision in *Ho Shing-tuen v. The Queen* (*supra*) was binding upon them. Silke J.A. said:

If a person gives assistance to a Crown servant, even though they themselves are not within that definition, in the commission of an offence under s. 10 of the ordinance, provided the person knows that the principal offender is maintaining a standard of living, knows that no explanation can be given or is reckless as to whether or not an explanation satisfactory to the Court can be given; then in those circumstances such a person can be convicted of aiding and abetting the Crown servant in the commission of the offence.

In their Lordships' view, the Court of Appeal and, the learned Judge were right in rejecting the argument that no offence was committed until the defendant had failed to discharge the *onus* of proof which rested upon her. True, she could not be convicted until she had so failed, but in their Lordship' view, both the natural construction of the subsection and the weight of authority both in Hong Kong and Australia, make it plain that the offence is the maintaining of a standard of living which cannot be satisfactorily explained, the burden of giving that explanation resting upon the defendant. The offence consists, not of a single act or of a succession of acts, but of a course of conduct during a period of time in relation to which the charge is brought under s. 10(1)(a). If a defendant is unable to give a satisfactory explanation he is likely to know that is the case. The decisions in Hong Kong which have held otherwise must, in their Lordships' view, with respect to the Judges concerned, be treated as having been wrongly decided.

Their Lordships have no doubt that s. 10(1) creates an offence different from the other offences enacted by Part II of the Ordinance. With all respect to the contrary view, it is not consistent with the language of the section to treat the subsection as no more than a means of overcoming the difficulty of proof involved in a prosecution under s. 3, so that in effect, a person convicted of an offence against either limb of s. 10(1) is, in truth, to be treated as being guilty of an offence against s. 3. If that had been the intention, it would not have been difficult to insert a deeming provision as indeed was done in the West Australian statute with which the High Court of Australia was concerned in the cases already referred to. Moreover, this view is inconsistent with the startling variation in penalties for the two offences to which their Lordships have already drawn attention. Nor, with respect, are their Lordships able to accept the view that s. 10(1)(a) is concerned only with events (that is to say, maintaining an excessive standard of living) following an earlier event (that is to say, the corrupt acquisition of assets) which has enabled those later events to take place, the suggested consequence being that there can therefore be no aiding and abetting of an event which has already taken place.

Let it be supposed that the Crown proves beyond all reasonable doubt that a Crown servant is maintaining an excessive standard of living. Let it be supposed that the evidence shows that a substantial sum of money is being paid monthly into the Crown servant's bank account. Let it be supposed that money is then paid out again from that bank account into that of his wife. Let it be supposed that acceptable evidence is called to show that the Crown servant was heard to tell his wife that he is receiving this money as a bribe from a third party, and that at long last they can together fulfil a long held wish to redecorate their house on an extravagant scale which could never be afforded on his salary, and that his wife, with that knowledge, proceeds to arrange first, by various bank account transactions to conceal the source of this money and then, progressively, as the money comes in, for that redecoration to take place. The Crown servant must know that he cannot give a satisfactory explanation. His wife must also know that he cannot give a satisfactory explanation. Their Lordships find it difficult to see why, in those circumstances, the wife should not be liable to be convicted of aiding and abetting the husband's offence against s. 10(1)(a). On the assumed facts, the wife knows that the husband has maintained, during the charge period,

a a standard of living beyond that justified by his salary. She also knows, to put it at its lowest, that it is more likely that not that he would be unable to discharge the burden resting upon him under the subsection. Yet with that knowledge she aided and abetted him by doing that which he invited her to do, by having the house redecorated and thus continuing to maintain the standard of living in question, and also helping to conceal whence came his ability to do so.

b The conclusion which their Lordships have thus reached is consistent with the direction given by the learned Judge and, subject to one matter, approved by the Court of Appeal. Their Lordships would, however, point out that, in his direction, the learned Judge made no reference to the possibility of recklessness as to the existence of a satisfactory explanation being sufficient. In the Court of Appeal Silke J.A., with the apparent approval of the other members of the Court, was clearly of the view that such recklessness as an alternative to knowledge would be sufficient. This matter was not fully debated before their Lordships and their Lordships prefer to express no opinion upon it since the matter does not arise directly for decision.

c

Their Lordships therefore reject the main arguments advanced on behalf of the wife's appeal.

d Their Lordships now turn to the other matters canvassed in support of the appeals both on behalf of the husband and the wife. A number of matters complained of before the Court of Appeal were not further pursued before their Lordships. Only four further matters were pursued, upon only one of which their Lordships found it necessary to invite the assistance of Mr. Denny Q.C. They can dispose of the other three quickly. There was a complaint of a comment made by prosecuting Counsel in relation to the absence of the wife in the witness box at the trial. Their Lordships see nothing improper in what was then said. There was a

e complaint regarding the behaviour of prosecuting Counsel in relation to payments allegedly made to a lady called Shining Sun. The alleged facts had been opened by prosecuting Counsel, but in the end, the lady was not available to be called to give evidence. The learned Judge very properly told the jury "put out of your minds completely" what had been said earlier. It was said that nonetheless, the jury retained a piece of paper which contained particulars of five payments, two allegedly made to this lady, in front of them for the rest of

f the trial, and therefore may have disregarded the learned Judge's warning. In their Lordships' view, there is nothing in this complaint. The complaint was made of the cross-examination of the husband at the trial. Their Lordships have read that cross-examination in full and can see nothing unfair in its conduct. Nor do they accept for one moment the complaint that because the wife was charged with the husband she ceased to be available to give evidence on his behalf. There is nothing unusual in this situation where a husband and wife are charged

g either jointly or separately in the same indictment. The only matter upon which their Lordships invited the assistance of Mr. Denny Q.C. was in relation to the complaint made of the conduct of this case by prosecuting Counsel and, in particular, of his conduct in relation to the so-called "contract" witnesses. Their Lordships have read and reread many pages of transcripts of this inordinately long trial. They are reluctant to criticise, but much of the blame for the length of the trial must, they fear, be laid at the door of Counsel on both sides. The unhappy

h relationship which grew up between them must have added greatly to the learned Judge's burdens and difficulties as well as to the length of the trial. The trouble arose from the fact that no less than 140 witnesses were named on the back of the indictment. This number included certain witnesses who became known as the "contract" or "property" witnesses. It is far from clear to their Lordships why their names were ever so included. In the event, the Crown did not wish to call them. Leading Counsel for the defence sought to insist that

i because the names were on the back of the indictment they must be called by the Crown.

This submission was in their Lordships view, as in that of the Court of Appeal, ill-founded. Their Lordships agree with the comment of Silke JA upon the matter. Unhappily, the learned Judge acceded to the submission. He thus gave leading Counsel for the defence his desired tactical advantage. The complaint was that Counsel for the prosecution, having been forced to call these witnesses in this way, then examined some of them in chief at increasingly excessive length - in one case for about one and a half days partly at least with a view to discrediting them before they were cross-examined. This in turn led to endless objections and sometimes, their Lordships say this with regret, to what appears to have been an unseemly wrangle between Counsel. In truth, this evidence was largely irrelevant. It could never have helped the prosecution and does not appear to have helped the defence. The learned Judge dealt with this evidence with scrupulous fairness and in great detail. He did so in a manner which could hardly have been more favourable to the husband. Whatever criticism may be made of the conduct of the prosecuting Counsel, it must be remembered that the trouble stemmed from the unnecessary inclusion of these names on the back of the indictment, a flawed submission by leading Counsel for the defence and a wrong acceptance of that submission by the learned Judge, as well as a protracted and largely unnecessary examination in chief by prosecuting Counsel. The Judge ultimately dealt with this quite admirably, and whatever the initial faults, they cannot be said in any way to have led to an unfair trial or to unsafe or unsatisfactory verdicts.

For all these reasons, their Lordships are satisfied that there are no grounds for disturbing either of these convictions. They will, therefore, humbly advise Her Majesty that both appeals ought to be dismissed. The appellants must pay the respondent's costs.

Lord Bridge of Harwich & Lord Jauncey of Tullichettle:

We regret to find ourselves constrained to dissent from the judgment of the majority of their Lordships. We make a different view from theirs of the true construction and effect of s. 10 of the Prevention of Bribery Ordinance (Cap. 201). The difference does not affect the appeal of the husband who was, on any construction of s. 10, rightly convicted for the reasons given by the majority. The difference does, however, affect the appeal of the wife who, on the view we take of the true construction of s. 10, could not be convicted of aiding and abetting the husband's offence.

The long title of the Ordinance reads:

> To make further and better provision for the prevention of bribery and for purposes necessary thereto or connected therewith.

Section 3 provides:

> Any Crown servant who, without the general or special permission of the Governor, solicits or accepts any advantage shall be guilty of an offence.

Sections 2 to 9 create a number of other offences all of which consist in the participation in corrupt transactions. Some of these offences can only be committed by public servants. The definitions of "Crown servant" and "public servant" are in terms which make clear that a Crown servant is a particular species of the genus public servant. Section 10(1) reads as follows:

> Any person who, being or having been a Crown servant:
>
> (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

It would be wrong to look at s. 10 in isolation. In the light of the long title to the Ordinance and of the preceding sections, s. 10 is plainly directed at corruption on the part of Crown servants. In the case of all the other offence creating sections participation in a corrupt transaction is required to be proved and, in particular, the essential ingredient which must be proved against a Crown servant charged with an offence under s. 3 is acceptance of a bribe. The legislature, however, recognised that there would be cases where outward signs were strongly indicative of corruption having taken place, but where it would be impossible to prove acceptance of a bribe. Section 10 was enacted to meet such a case. In this context we can do no better than quote the words of Lord Edmund-Davies in *Reg. v. Cheung Chee-Kwong* [1979] HKLR 362 where he said at p. 364:

> The foregoing provisions were added to the Prevention of Bribery Ordinance in 1971 and were manifestly designed to meet cases where, while it might be difficult or even impossible for the prosecution to establish that a particular Crown servant had received any bribe or bribes, nevertheless his material possessions were of an amount or value so disproportionate to his official emoluments as to create a *prima facie* case that he had been corrupted. On such circumstances being established by the Crown, the Ordinance imposed upon the accused the burden of satisfying the Court that his seemingly disproportionate resources had in fact been innocently acquired.

The primary submission on behalf of the appellants is that no offence can be committed under s. 10 until the defendant has been charged, has appeared in Court and has failed to give a satisfactory explanation to the Court. Although this construction gives effect to the literal meaning of the language of this ineptly drafted provisions, there is an insuperable logical difficulty in the concept of a criminal offence with which the offender can be charged before it is committed and which he will only commit, if at all, in the course of the trial. We respectfully agree with the majority's rejection of this construction.

Once the literal construction is rejected, it is inevitable that the language of the section must be in some degree modified to give it a sensible effect. Obviously it was not intended to make Crown servants guilty of an offence consisting simply in the maintenance of a standard of living or in having control of resources disproportionate to official emoluments. In seeking to discover the true construction we shall concentrate attention first on s. 10(1)(b). There are only two possible constructions of this provision. On one construction it creates an offence of which the ingredients are that the present or past Crown servant (1) has control of resources disproportionate to his official emoluments and (2) knows that he cannot (or cannot in fact) give an innocent explanation as to how such resources came under his control. This is the construction favoured by the majority and we shall refer to it as the "majority construction". The alternative construction is that the provision is intended to create a presumption. Proof that the Crown servant controls resources disproportionate to his official emoluments gives rise to a presumption which the words "unless he gives a satisfactory explanation to the Court" require him to rebut. The nature of the presumption is indicated by the nature of the explanation called for viz. "as to ... how much pecuniary resources or property came under his control". If he gives an explanation which shows that the resources came under his control innocently he is to be acquitted. But if he fails to give such an explanation, the resources are presumed to have come under his control in the course of

one or more corrupt transactions, and it is his presumed participation in those transactions which constitutes the offence of which he is to be convicted. This we shall refer to as "the alternative construction".

Mutatis mutandis a similar choice falls to be made between the majority and the alternative constructions in the interpretation of the provisions of s. 10(1)(a). On the alternative construction the presumption here arises from the maintenance of a standard of living above that which is commensurate with the Crown servant's official emoluments and the explanation called for is "as to how he was able to maintain such a standard of living" or, in other words, how he obtained the resources enabling him to maintain that standard. Here again, on his failure to give such an explanation, he is presumed to have obtained the resources by participation in corrupt transactions and it is this which constitutes the offence. For our part, we see no linguistic difficulty in construing a provision which casts the onus on a defendant of proving his innocence as intended to create a presumption of guilt and in discovering the essential character of the guilt which is to be presumed by looking at the nature of the rebuttal of the presumption which is called for.

The alternative construction derives some support from the fact that an offence under s. 10 can be committed by a person who has been but is no longer a Crown servant. This contrasts with s. 3 under which an offence can only be committed by an existing Crown servant.

Section 21(1) of the Ordinance provides:

> (1) In any proceedings against a person for an offence under Part II (other than s. 10), the fact that the accused was, at or about the date of or at any time since the date of the alleged offence, or is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the date of or at any time since the date of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken by the Court:
>
> (a) as corroborating the testimony of any witness giving evidence in such proceedings that the accused accepted or solicited any advantage; and
>
> (b) as showing that such advantage was accepted or solicited as an inducement or reward.

Here again it is wholly consistent with the alternative construction that the evidence treated by s. 21(1) as corroborative guilt of an offence of participation in a corrupt transaction should have the effect under s. 10 of giving rise to a presumption of participation in such a transaction. Section 21 is inconsistent with the majority construction which requires that what is in one context treated as evidence corroborative of guilt of an offence of participation in a corrupt transaction should in another context be treated as a separate offence distinct from such participation.

But in the last analysis, since both the majority construction and the alternative construction are possible readings of the language of s. 10, the choice between them must lie in a purposive approach. On the one hand we do not think that the alternative construction in any way blunts the cutting edge of s. 10 as a draconian weapon for the suppression of corruption in a society where corruption is a great scourge. If, as we think and as the majority appear to accept, the primary purpose of s. 10 is to overcome "the notorious evidential difficulty of proving offences" of direct participation in corrupt transactions, the alternative construction enables the section to achieve this precise purpose, no more and no less. On the other hand, the majority construction enlarges the scope of s. 10 in two quite remarkable respects.

First, s. 10(1)(b), on the majority construction, necessarily creates a continuing offence, as Mr. Denny boldly argued that it was intended to do. The consequences of this are startling. They may be illustrated by a simple example. A Crown servant is in possession of a Picasso painting worth many times his annual salary. He is prosecuted and convicted under s. 10(1)(b) since he can give no satisfactory explanation as to how the painting came under his control. It was in fact accepted by him as a bribe for which he could have been convicted of an offence under s. 3 if the Crown had been able to prove the commission of the offence directly. Following his first conviction under s. 10 and having paid his fine or served his sentence of imprisonment, the Crown servant still retains the painting. He is prosecuted for a second offence under s. 10 in respect of his continued possession of the painting. He can, of course, still give no satisfactory explanation of how it came under his control nor, on the majority construction, can be plead *autrefois* convict. He is accordingly convicted again. On the majority construction this process can be repeated indefinitely. Logically, this wicked recidivist who obstinately persists in clinging to the property originally obtained in the course of a corrupt transaction ought to receive increasingly severe sentences for his repeated commission of the same offence. The only way he can escape from his difficulty will be by destroying the painting or giving it away. Even if he sells it he will be liable to prosecution once more under s. 10(1)(b) if he retains the proceeds of sale or under s. 10(1)(a) if he uses them for his own living expenses. These results of adopting the majority construction seem to us manifestly absurd. It is no answer to say that the Attorney-General would never give his consent to repeated prosecutions in these circumstances. This only goes to show that the legislature cannot have intended that s. 10(1)(b) should create a continuing offence.

The second remarkable consequence of adopting the majority construction is the impact of s. 10 on third parties. If the offence created by s. 10 is that which the Crown servant is presumed to have committed in corruptly obtaining the assets under his control or the means which have enabled him to maintain an excessive standard of living, proof of the offence in reliance on the presumption will be incapable of establishing that any third party was particeps criminis. But if the majority construction is right, third parties who deal with Crown servants whom they know to be in control of assets or to maintain a standard of living disproportionate to their emoluments will be at risk of conviction as aiders and abettors even though they had no connection whatever with the prior corrupt transactions. As the case is put for the prosecution, anyone who assists a Crown servant in his possession of excess assets or who shares in the enjoyment of his excessive standard of living or is in receipt of any of his excessive expenditure will be guilty as an aider and abettor if he knows that the Crown servant cannot give a satisfactory explanation as to how the assets came under his control or how he obtained the means to support his standard of living, or if he is reckless as to whether or not a satisfactory explanation can be given. The Court of Appeal in Hong Kong accepted that recklessness in this regard was a sufficient *mens rea* to convict the aider and abettor. The majority leave the question of the necessary *mens rea* undecided. Hence the law in Hong Kong will remain as declared by the Court of Appeal. This creates a situation in which any banker who maintains an account for a Crown servant, any tradesman who deals with him, any friend who enjoys his hospitality, to say nothing of the wife who shares his life, will be put on inquiry, if the Crown servant appears to live beyond his official means, as to how he acquired the resources enabling him to do so and, if not satisfied that he can explain his affluence innocently, will be unable safely to have any further dealings with him. If the wife of a Crown servant comes to realise that he cannot explain the source of his excess wealth, it would seem, quite literally, that the only safe course for her, if she wishes to avoid conviction, will be to leave him.

Now it is of course possible for a legislature to produce consequences of this kind if they are thought necessary and appropriate. But if they were intended, we should certainly expect them to be spelled out in clear and specific terms, not to come in by a side wind from the construction put upon such an inexpertly drafted provision as is found in s. 10. By way of illustration of what we have in mind, we would refer to the elaborate provision now on the English statute book directed at third parties who assist drug traffickers in the enjoyment or disposal of the proceeds of their illicit traffic: see s. 24 of the Drug Trafficking Offences Act 1986.

We have not overlooked the circumstance, on which the majority place some reliance, that by s. 12 of the Ordinance an offence under s. 10 attracts a heavier penalty than one under s. 3. But it seems to us that the irrationality of the scale of penalties under s. 12 is so impenetrably obscure that it is incapable of throwing any light on the question at issue.

At the end of the day we are of opinion that, if the undoubted ambiguity of s. 10 cannot be resolved in any other way, it must in any event yield to the principle that a provision in a criminal statute should be construed in favour of the subject and hence be given no wider operation and effect than the language or the manifest purpose of the provision require.

For these reasons we would have been in favour of allowing the wife's appeal.

Also found at [1990] 2 CLJ 144